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No. 97-1997

Supreme Court, U.S.
FILED
JUL 27 1998
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION,

Petitioner,

v.

VIRGINIA M. MARQUES,

Respondent.

On Petition for Writ of Certiorari to the California Court of Appeal First Appellate District

BRIEF OF THE AMICI CURIAE AMERICAN BANKERS ASSOCIATION AND CALIFORNIA BANKERS ASSOCIATION IN SUPPORT OF PETITIONER

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July 27, 1998

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16 pp

QUESTION PRESENTED

Whether the National Bank Act, which provides that National Banks may dismiss any of their officers at pleasure, preempts the California Fair Employment and Housing Act which, as applied here, provides that they may not.

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BRIEF OF THE AMICI CURIAE AMERICAN BANKERS ASSOCIATION and CALIFORNIA BANKERS ASSOCIATION IN SUPPORT OF PETITIONER[1]

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[1] No counsel for any party had any role in authoring this brief and no person other than amici curiae made any monetary contribution to its preparation or submission.

The American Bankers Association and California Bankers Association hereby respectfully submit this brief as amici curiae in support of the Petitioner in accordance with the provisions of Rule 37.2 of the Supreme Court Rules. Both parties have consented to the filing of this brief, and their written consents are filed herewith.

INTEREST OF THE AMICI CURIAE

The American Bankers Association and California Bankers Association are, respectively, the principal trade associations for the lending industry nationwide and in the State of California. As representatives for that industry, the associations have a vital interest in this case. This case calls into question the supremacy of provisions of the National Bank Act (under which national banks have operated for well over a century) over contrary state law. If the California Court of Appeal is correct in denying preemptive effect to Section 24 (Fifth) of the National Bank Act, then national banks, nationwide, can be subjected to varied and conflicting obligations with respect to the most critical of their employment decisions, and, most particularly, having those critical decisions second-guessed by state or even municipal authorities in each jurisdiction in which they operate. State and municipal "fair employment" officials, of course, have a different agenda than the safe and sound operation of the national banking system. That agenda is not denigrated here. But Congress has long since vested plenary authority elsewhere to regulate the activities of national banks, leaving no room for supplementation or displacement by local authorities. Consequently, the case raises issues that are of considerable concern to the banking industry at large, and we respectfully submit this brief in order to address those concerns.

REASONS FOR GRANTING THE WRIT

The Conflict Among the Courts

In relevant part, Section 24 (Fifth) of the National Bank Act (12 U.S.C. § 24 (Fifth) (1998)) grants to national banks the apparently unqualified right to "dismiss [their] officers or any of them at pleasure." Federal Reserve Banks similarly have a "dismiss at pleasure" right granted to them by federal statute, 12 U.S.C. § 341 (1998), as do Federal Home Loan Banks, 12 U.S.C. § 1432 (1998). In the latter two cases, the right extends to all employees; in the case of national banks, it is limited to officers of the bank such as the Respondent here, a former vice-president of Bank of America, a national bank. Notwithstanding the difference in scope of the three statutes on a matter not relevant to this case, the courts have regularly and, in our view, correctly construed the "dismissal at pleasure" language of the three (and, in fact, comparable state banking laws as well) *in pari materia*. *See, e.g.*, *Mardula v. Rancho Dominguez Bank*, 43 Cal.App.4th 790, 793 (Cal.App. 1996), *cert. denied*, 117 S. Ct. 1106 (1997); *Citizens State Bank v. Libertelli*, 215 N.J.Super. 190, 521 A.2d 867 (N.J. Super. 1987).

In *Ana Leon T. v. Federal Reserve Bank of Chicago*, 823 F.2d 928 (6th Cir.), *cert. denied*, 484 U.S. 945 (1987), the Sixth Circuit held that a Michigan state law prohibition against racial discrimination in employment was preempted by the comparable provision of the Federal Reserve Act, but in *Moodie v. Federal Reserve Bank of New York*, 831 F.Supp. 333 (S.D. N.Y. 1993), a federal district court reached the opposite conclusion construing the same federal law. So did a state court in Ohio in *White v. Federal Reserve Bank*, 660 N.E. 2d 493 (Ohio App. 1995).

In *Kispert v. Federal Home Loan Bank*, 778 F. Supp. 950 (S.D. Ohio, 1991), a federal district court within the Sixth Circuit applied the reasoning of *Ana Leon T.* to find that the dismissal at pleasure provisions governing Federal Home Loan Banks preempted contrary state law. So did the Southern District of New York in *Osei-Bonsu v. Federal Home Loan Bank of New York*, 726 F. Supp 95 (S.D.N.Y. 1989), a decision whose reasoning was not followed by the same district court four years later in *Moodie*.[2]

The decision of the court below continues and exacerbates the conflict among the courts. *Marques* holds that state discrimination claims are not preempted by the National Bank Act in the face of even California state court precedents that hold the contrary. In *Mardulla*, for example, the California Court of Appeal wrote that

> section 24, and similar provisions...bar covered offices and employees from claiming that their discharge constituted...violation of state antidiscrimination statutes... [Cited] cases implement a forceful public policy that a nationally chartered bank must be free to remove and replace officers at will.

Mardulla v. Rancho Dominguez Bank, supra., 43 Cal.App.4th at 793-794.

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[2] *See also Confer v. Federal Home Loan Bank*, 271 Ill. App. 3d 1061, 649 N.E. 2d 476, 479 (Ill. App. 1995) holding that a state law "retaliatory discharge" claim was preempted by the Home Loan Bank law and opining, in dicta, that a state age discrimination claim would have been preempted, too.

Similarly, in *Aalgaard v. Merchants National Bank*, 224 Cal.App.3d 674, 692 (1990), *cert. denied,* 502 U.S. 901 (1991), the court wrote that permitting state law discrimination claims "would frustrate the full effectiveness of federal law by diminishing the full power of the board to dismiss its officers for the benefit of national banks."

It is difficult, if not impossible, to reconcile either of those conclusions with the outcome of *Marques* in the case below. The court below attempts to distinguish away its *Aalgaard* precedent on the grounds that Merchants National Bank was a little national bank and Bank of America is a big one. Pet. App. at 4a-5a. (Federal equal employment opportunity laws, but not California state laws, exempt small employers from coverage. *See* 29 U.S.C. § 630(b); 42 U.S.C. § 2000e(b)). But there is no basis for such a distinction in the National Bank Act or in preemption doctrine generally. State second-guessing of national bank officer employment decisions either "frustrates the full effectiveness of federal law" or it does not. It either "diminish[es] the full power of the board to dismiss its officers" or it does not. It either "prevent[s] or significantly interfere[s] with the national bank's exercise of its powers"[3] or it does not. If applicability of state anti-discrimination laws to national banks does have any of these effects, the state laws are clearly preempted; if the state laws do not have any such effect, then they are not preempted, without regard, either way, for the size of the bank in question. Yet the California courts reach conflicting decisions based upon this irrelevant consideration.

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[3] *Barnett Bank v. Nelson*, 116 S. Ct. 1103, 1109 (1996).

Clearly, therefore, state and federal appellate courts, and state and federal trial courts have taken irreconcilable positions on the question whether the National Bank Act officer employment provisions and comparable provisions applicable to Federal Reserve Banks and Federal Home Loan Banks preempt state antidiscrimination laws. Those conflicts among the courts have arisen over the course of at least a decade of litigation and will continue to plague the bench and the bar in the absence of a definitive resolution of the issue by this Court.

The Importance of the Issue

The court below concluded that, despite the plain language of Section 24 (Fifth), "under federal law, a national bank may no longer exercise the power to dismiss at pleasure an officer who can show her termination was discriminatory." Pet. App. at 9a. That being the case, the court goes on, "once that power is diminished by Congress's determination to outlaw discriminatory terminations, it is hard to see how the public trust rationale mandates 'a national standard for the dismissal of bank officers'" *Id.* at 8a. The court below, likewise too lightly, also dismisses an expressed concern for the need of uniform national standards in the governance of national banks: "To invoke the concept of 'uniformity,' however, is not to prove its need." *Id.* At 7a. (quoting *Atherton v. FDIC*, 117 S. Ct. 666, 671 (1997)).

The decision of the court below is based upon a fundamentally flawed premise. It *assumes* that the federal equal employment opportunity laws apply to national bank *officer* employment decisions. If that is so, the court reasons, then state fair employment laws to the same effect as the federal laws are not inconsistent with federal law

considered as a whole, and are not preempted. But it is not at all clear that Title VII and the Age Discrimination in Employment Act ("ADEA") *do* apply in this context. Certainly, national banks have and claim no exemption from these statutes with respect to their employment of non-officer personnel. But officers are different. They are made so by Section 24 (Fifth) of the National Bank Act, a section of the law that was left unaltered by the Congress when it enacted ADEA and Title VII and thereafter.

ADEA and Title VII are laws of general applicability. They govern the activities of "employers." 29 U.S.C. § 623; 42 U.S.C. § 2000e-2. Section 24 (Fifth), on the other hand, is of quite limited and specific applicability. By its own terms, it governs the employment practices of one discrete and identified class of employer, and even then, only those employment practices that pertain to the banks' officers. It is a most common rule of statutory construction, endorsed over and over again by this Court[4], that a specific statute is deemed to control over a general one where the two would otherwise be in conflict.

Moreover, this Court regularly holds that "repeals by implication will not be recognized, insofar as two statutes are capable of co-existence, 'absent a clearly expressed congressional intent to the contrary.'" *Astoria Federal Savings & Loan Association v. Solimino*, 501 U.S. 104, 109 (1991) (citing *Morton v. Mancari*, 417 U.S. 535, 551 (1974)). *See also County of Yakima v. Confederated*

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[4] *See, e.g., Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987); *Busic v. United States*, 446 U.S. 398, 406 (1980), *Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222, 228-229 (1957), *Clifford F. MacEvoy Co. v. United States*, 322 U.S. 102, 107 (1944).

Tribes and Bands of Yakima Indian Nation, 502 U.S. 251, 262 (1992). And yet to hold that the federal equal employment opportunity laws govern national bank officer employment decisions necessarily assumes that a portion of the National Bank Act has been repealed by implication. Nothing in the text of the equal employment opportunity laws or the legislative history surrounding the enactment of those laws evidences any intent of Congress to do so or even any indication that Congress considered the matter at all, one way or the other.

The court below ignored those principles and dismissed out of hand well over a century of precedent that has established (not just "invoked") the need, not only for uniformity in the treatment of national banks, but also for the safety and soundness of those banks.

The Eighth Circuit, as long ago as 1896, held that the purpose of Section 24 (Fifth) was to codify the "observation and experience...that it is essential to the safety and prosperity of banking institutions that the active officers, to whose integrity and discretion the moneys and property of the bank and its customers are intrusted, should be subject to immediate removal whenever the suspicion of faithlessness or negligence attaches to them. High credit is indispensable to the success and prosperity of a bank." *Westervelt v. Mohrenstecher*, 76 F. 118, 122 (8th Cir. 1896). The Ninth Circuit agreed -- 93 years later -- holding that the purpose of Section 24 (Fifth) "was to give those institutions the greatest latitude possible to hire and fire their chief operating officers, in order *to maintain the public trust." Mackey v. Pioneer National Bank*, 867 F.2d 520, 526 (9th Cir. 1989). Thus, courts have recognized the overriding importance of vesting broad discretion in bank

boards both before and after enactment of the various federal and state anti-discrimination statutes.

Nevertheless, the court below belittles those holdings, saying that "public trust in a large financial institution such as Bank of America is no longer based primarily on community confidence in the personal integrity of its individual officers." Pet. App. at 8a, n. 5. To the extent that might be true, it supports, rather than detracts from, the petitioner's contention that federal law preempts contrary state law in this case. If anything has replaced "integrity" as a factor in the "public trust" of banks, it is federal deposit insurance, which was created during the Depression precisely in order to promote confidence in the nation's banking system. *Gunter v. Hutcheson*, 674 F.2d 862, 870 (11th Cir.), *cert. denied,* 459 U.S. 826, *rehearing denied,* 459 U.S. 1059 (1982). The Federal Deposit Insurance Corporation, an agency of the United States government, was created to administer a deposit insurance fund, 12 U.S.C. §§ 1821-1823. Consequently, there is a distinct interest of the federal government itself, in addition to the interests of the customers of banks, in the safety and soundness of the banks. Prior to the enactment of the Federal Deposit Insurance Act, Congress saw fit to entrust the "integrity" of national bank officers to the bank's board of directors. After creation of Federal deposit insurance, Congress did not see fit to withdraw that function from banks' boards, at least in the first instance, but did choose to supplement board supervision with a grant of authority to the Comptroller of the Currency (in the case of national banks) to remove an officer of a national bank who has violated any law or regulation or who has engaged in unsafe or unsound practices in connection with the bank. Pub. L. 89-695, § 202 (1966) (12 U.S.C. § 1818(e)).

Thus, the "public trust" in national banks that was important in the last century has remained important to this day, though perhaps in part for different reasons. Congress has elected how it wishes to support and affirm that public trust through its regulation of national bank officer employment practices--by a bank's board of directors in the first instance, and then by supervision of the Comptroller of the Currency. The statutes leave no room for second-guessing by state fair employment practices laws that do not place such safety and soundness concerns in the balance with the putative concerns of persons the state laws were designed to serve. The California Court of Appeal's cavalier disregard of such a critical matter of national and federal concern should not stand unreviewed and unchanged.

CONCLUSION

For all of the reasons stated herein and in the bank's Petition for Writ of Certiorari, we respectfully urge the Court to grant that Petition.

Respectfully submitted,

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